

Discrimination Complaint Processing Update



Department of Veterans Affairs
Office of Resolution Management
www.va.gov/orm

**“Honoring and Serving our Nation’s Veterans by Promoting
Discrimination-free Environments”**

From the Deputy Assistant Secretary

Summer 2005



Addressing Workplace Complaints on the Front-End

Addressing complaints on the front-end at facilities is one of the most important steps you can take as managers to help improve the workplace. It involves employing prevention strategies, emphasizing early resolution, encouraging the use of alternative dispute resolution, and creating employer-of-choice environments.

Being proactive in this area benefits both you and your employees. Issues are addressed when they arise. Employees see first hand that management is willing to take an active roll in addressing their concerns. Management also has a better idea of the types of issues that are occurring that could have a negative affect on the workplace and can develop strategies to address the most serious. Issues are not ignored nor do they drag on while being addressed in the formal complaint process. Reducing the number of complaints on the front-end is also a cost savings initiative. Fewer complaints mean a decrease in the amount of funds that have to be obligated for this purpose.

ORM offers a variety of tools to help you address workplace complaints on the front-end. They include:

- Organizational Climate Assistance Program (OCAP)
- Complaint Root Cause Information
- Complaint Trend Data
- Alternative Dispute Resolution Program assistance
- EEO Training

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Improved morale, increased productivity, and a sense of inclusion for all employees are some of the tangible rewards that can be garnered from adopting a front-end approach to addressing complaints. Improving the workplace, that’s the ultimate goal.

James S. Jones

Did You Know?

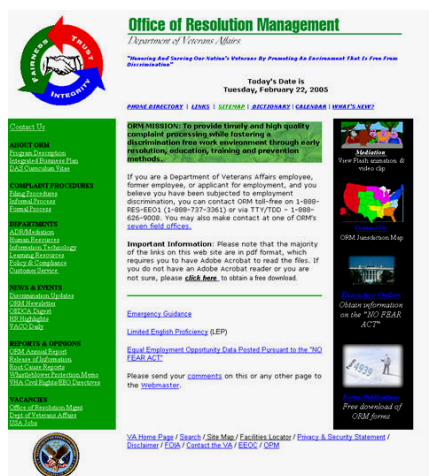
ORM Facts & Figures

- ORM employees completed timely counseling in 97.7% of the 4,129 informal complaints processed in FY 2004. This is 21% better than the government-wide average of 76.3% for the same period.
- ORM averaged 157 days to complete investigations through the third quarter of FY 2005 and expects to maintain this level of performance through the end of the fiscal year. In FY 2004 investigations were completed in an average of 220 days. This was 20% less than the government-wide average of 280 days for the same period. The Equal Employment Opportunity (EEO) standard for completing investigations is 180 days.
- In 1999 ORM's budget was .057% of the total VA budget. In 2005 it was .040% of the total VA budget, a 24 % decrease.
- ADR/Mediation Program Design
ORM assists the Administrations in designing and implementing mediation programs at their facilities. This includes developing mediation policies and referral programs; developing marketing strategies; providing mediation skills, and awareness training to supervisors and employees.
- Organizational Climate Assistance Program (OCAP)
OCAP is a tool designed to diagnose employee perceptions of the work place and assist management officials in understanding what drives employee satisfaction or dissatisfaction. OCAP provides a structured process to collect and analyze information concerning work place environments. This proactive approach gives important feedback to managers to contain or diffuse potential disputes or EEO complaints.
- Root Cause Report
Root cause analysis is an assessment of the underlying causes of workplace disputes resulting in EEO complaints that, after being fully adjudicated, do not result in a finding discrimination. This report is designed to help managers identify to the causes of complaints and address issues that can improve communication, morale, and the workplace environment.

- **Department-Wide EEO Complaint Activity Trend Data**
ORM produces comparison charts of EEO activity by fiscal year. Trends are charted for both informal and formal complaint activities for the Veterans Health Administration, Veterans Benefits Administration, National Cemetery Administration, VA Central Office, and Canteen Service. These charts provide a statistical comparison of complaint activity.
- **ORM Regional EEO Training Conference** – Chicago was the location of the Great Lakes Operations' Regional EEO Conference that was held July 26 – July 28, 2005. The theme of the conference was "We Can Make a Difference in Resolving Workplace Disputes." This is one of several ORM regional training conferences held this year. Topics discussed included:
 - Improving Environments to Better Serve Our Nations Veterans
 - Resolving EEO Complaints Through Mediation
 - How Do We Overcome the Obstacles to Mediating EEO Complaints?
 - ADR, A Bridge to Resolution
 - Mediating Workplace Disputes in the 21st Century
 - Senior Managers and the Union ■

ORM on the WEB

The ORM Web sites, www.va.gov/orm (Internet) or <http://vawww.va.gov/orm> (Intranet) provide comprehensive information on ORM programs and services.



- EEO complaint polices and procedures
- ORM Programs
- Quarterly Discrimination Complaint Processing Update Newsletter
- ADR/Mediation Program Information and Training Videos
- ORM Fiscal Year Annual Reports
- Publications and Forms ■

ADR Q&A

The following questions and answers about alternative dispute resolution (ADR) come from the EEOC. They provide helpful information on the benefits of ADR and how this program works. This information is presented as part of our continuing effort to encourage the use of ADR throughout VA.

I understand that all agencies are required to have an ADR program available in the EEO process. Does this mean that an agency must offer ADR in every case?

No. Agencies are not required to offer ADR in every case. There may be cases where ADR is not appropriate or feasible.

When will an agency offer ADR?

Agencies may be flexible in designing their ADR programs to fit their environment and workforce. The offer may be made either at the pre-complaint phase of the process, or after the formal complaint has been filed. In this regard, agencies have the discretion to determine whether a given dispute is appropriate for ADR. Agencies may decide to offer ADR on a case-by-case basis, by issue, and/or by geographic location. However, agencies may not decline to offer ADR because of the bases involved in a particular case (i.e., race, color, religion, national origin, sex, age, disability, or retaliation).

Can an employee file a complaint against an agency if it refuses to offer ADR in a particular case?

No. An agency's decision not to offer ADR for a particular case cannot be made the subject of an EEO complaint.

Can an employee who has elected ADR withdraw from the process?

Yes. The ADR process is voluntary and the aggrieved party can withdraw at any time.

If ADR fails, what is the role of the EEO Counselor?

Should ADR fail to resolve the matter, the case is referred back to the EEO counselor for the issuance of a notice of final interview. No further informal resolution efforts should be made by the EEO Counselor.



Can agencies utilize binding arbitration as an ADR technique under Part 1614?

No. ADR programs cannot diminish an individual's right to pursue his or her claim under the 1614 process. Binding arbitration is not an appropriate ADR technique in the EEO process because it would require an individual to waive his/her right to a hearing or to appeal the matter to the EEOC. This requirement, however, does not prevent agencies from using binding arbitration in their grievance process.

I understand that ADR is a confidential process. What exactly does this mean?

If a party tells the neutral something in private and asks the neutral to keep the matter confidential, the neutral is bound by law not to disclose this information voluntarily. There are some exceptions to this rule. For example, if a party confesses to the commission of a criminal offense, or to an act of fraud, waste, or abuse, or that the party plans to commit a violent physical act, the neutral may be required to share this information with appropriate authorities. If a judge determines that disclosure of private confidential discussions is necessary to prevent a manifest injustice, establish a violation of law, or prevent harm to the public health or safety, the neutral may be required by a court to disclose the private discussions.

Are settlement agreements confidential?

No. Neither the Alternative Dispute Resolution Act nor MD-110 requires settlement agreements to be confidential. Even when the parties specifically agree to keep the terms of their settlement agreement confidential, the details of the resolution must still be given to specific offices with a need to have that information, such as those offices which will implement the settlement.

What role does the responsible management official have in ADR?

Once the agency has determined that a matter is appropriate for ADR, it can decide who should represent the agency and can require the responsible management official (RMO), or the agency official directly involved in the case, to cooperate in the ADR process. ■

The Mediation Zone

“The Mediation Zone,” is an on-line ADR training video. This 31-minute web-cast, featuring video and audio streaming, explains the mediation process and demonstrates its usefulness. It is available at <http://vaww.va.gov/orm/adr.htm>.

Need help in advertising ADR? This Mediation/ADR poster, along with additional information on ADR is available on-line at <http://vaww.va.gov/orm/adr.htm>.

Mediation/ADR

... is the road to complaint resolution

The ADR Program "Promptly Addresses VA EEO and Non-EEO Employment and Workplace Disputes."

It is a program that provides a speedy alternative to resolving EEO and Non-EEO employment and workplace disputes in more formal processes.

The ADR Program within the Department of Veterans Affairs allows employees to use Mediation/ADR for both their EEO and Non-EEO employment and workplace disputes.

Mediation/ADR

It gives employees the option to mediate their disputes in a safe environment without risking right to pursue EEO and other options if case is not resolved in mediation.



Consider Mediation/ADR if:

- You are looking for a new faster way to resolve your EEO and non-EEO related employment or workplace disputes.
- You believe that a mediator may assist you in resolving your EEO and non-EEO related employment or workplace disputes.

Contact your local EEO Manager, local ADR Coordinator, VISN, VBA area offices, NCA Lead ADR Coordinator, an EEO Counselor, Union Representative and/or an ORM Office for more detailed information at 1-888-737-3361, or go to the following websites:
(For ORM, www.va.gov/orm or www.vaww.va.gov/orm or for VA website, www.va.gov/adr or www.vaww.va.gov/adr)



ADR Coordinator Name: _____ Telephone number: _____

How Does Mediation/ADR Work?

Alternative Dispute Resolution (ADR)/Mediation Process: ADR/Mediation is available within the Department of Veterans Affairs for all employees nationwide. Employees participation in ADR/Mediation is voluntary; however, VA's policy encourages employees to use mediation to help resolve workplace conflicts as early as feasible, to the maximum extent practicable in an appropriate and cost effective manner, and at the lowest organizational level.

1. On an EEO dispute, which is from an employee, former employee, and/or applicant for employment who believes that he/she has been discriminated against on the basis of race, color, religion, sex, national origin, age (40 years and above), disability, or reprisal based on prior EEO activity, is defined as an EEO Dispute, must contact ORM first. An EEO Counselor will get an agreement by both parties before they are entered into mediation. It is important to contact ORM first to retain your right to proceed in the EEO arena should mediation not result in resolution of the dispute.
2. For non-EEO related employment or workplace disputes, you may enter ADR/Mediation through the appropriate venues by contacting your local ADR Coordinator/Manager. It is important to contact the appropriate venues first to retain your right to proceed in the non-EEO arena should mediation not result in resolution of the dispute. If your dispute involves allegations of discrimination, your decision to engage in the ADR process DOES NOT relieve you of your obligation to meet the 45-day deadline for contacting an EEO counselor and/or your 15-day deadline for filing a formal EEO complaint.
3. Your request for mediation will be addressed as soon as possible.
4. The mediation process starts with a joint session with you and the person responsible for the dispute where the mediator(s) will explain how the process works and answer your questions. Then you and your supervisor will each get to tell your side of the dispute. Afterwards, the mediator(s) will meet with each of you separately to discuss the problem and help you and your supervisor find a solution.
5. If a settlement is reached on an EEO dispute, it will be binding on everyone and the EEO dispute will be withdrawn. If an EEO settlement is not reached, you can pursue your EEO rights through the appropriate EEO venues.
6. If a settlement is not reached on a non-EEO related employment and/or workplace dispute, you can continue to pursue your rights through the appropriate venues if you are within your timeline, e.g., VA and Union Grievances, Unfair Labor Practice (ULP), Merit System Protection Board (MSPB), etc.

Why Choose Mediation/ADR Under the ADR Program?

MEDIATION IS FAST.

It gives you a chance to meet face to face in a controlled environment with your supervisor soon after the dispute arises.

MEDIATORS DO NOT MAKE DECISIONS OR FORCE DECISIONS ON YOU.

Mediators are trained to work with all parties to help them find solutions to their dispute. An agreement crafted by the people involved is almost always more satisfying and more lasting than one dictated by an outside third party.

MEDIATORS ARE IMPARTIAL.

They are trained, experienced, third party neutrals.

MEDIATION IS INFORMAL.

No witnesses are called, nobody testifies under oath, and no complicated procedures and technicalities get in your way. Being a representative if you wish, but the process is designed for people who are handling the problem themselves.

MEDIATION IS FREE.

There is no cost to you for mediation.

MEDIATION IS CONFIDENTIAL.

What you tell the mediator(s) when you are alone is kept between the two of you unless you agree to let the mediator(s) share it with the disputing individual. After the mediation is over, the mediator(s) destroys all notes of discussions with you.

The Department of Veterans Affairs prohibits discrimination on the basis of race, color, sex, national origin, religion, age (40 years and above), disability, or reprisal based on prior EEO activity.
The Department of Veterans Affairs is an equal employment opportunity employer.

Elements of a Model EEO Programs

Understanding how equal employment opportunity (EEO) rules and regulations affect the workplace is important for both managers and employees. The Government Accountability Office (GAO), in a recent report, “Equal Employment Opportunity – The Policy Framework in the Federal Workplace and the Roles of EEOC and OPM,” outlined ways Federal agencies can better follow federal laws and comply with EEO rules and regulations.

According to GAO, an agency will not have a highly effective EEO policy without commitment from leadership. This can be accomplished by producing a meaningful statement of EEO policy, by committing sufficient resources, and by ensuring that all employees are informed of EEO policies and procedures.

In addition, an agency’s strategic mission should also be fully immersed with its EEO program. Managers should be an integral part of the agency’s EEO program, with the EEO office providing managers with direction and guidance, as well as monitoring key activities.

The report goes on to say that EEO officials need to be involved in critical workplace decisions through access to senior staff and participation in meetings that involve critical personnel decisions.

The following is a synopsis of the “Elements of a Model EEO Program” outlined in the report. Each of these areas requires the full participation of Department managers at all levels and across program areas to ensure agencies comply with equal employment opportunity (EEO) rules and regulations.

Management and program accountability:

- Hiring managers and supervisors who have the skills needed to supervise in a diverse workplace.
- Making clear that all managers and supervisors share responsibility with EEO program and human resources officials for the success of the EEO programs.
- Making EEO an element in supervisors’ and managers’ performance evaluations, with successful performance for all managers and

supervisors contingent on efforts to achieve a workforce free of discrimination.

- **Providing for effective coordination between the agency's EEO office and other management programs, such as the Federal Equal Opportunity Recruitment Program, the Alternative Dispute Resolution office, and the Employee Relations office.**

Proactive Prevention of unlawful discrimination:

- **Self assessing the EEO program to monitor progress; prevent discrimination and identify barriers to free and open competition.**
- **Developing a comprehensive anti-harassment policy that includes informing employees of prohibited behavior, providing multiple avenues of redress, and making clear that acts of harassment will not be tolerated.**
- **Having an effective reasonable accommodation procedure to handle the needs of employees with disabilities.**

Efficiency:

- **Having a fair, impartial and neutral complaint resolution system that includes access to ADR and timely compliance with orders from the EEOC and other entities – such as the Merit Systems Protection Board and the Federal Labor Relations Authority.**
- **Having an efficient system for collecting and analyzing data on workforce composition and on discrimination complaints and their resolution.**
- **Consulting with the EEOC to learn about best practices in other agencies.**

Responsiveness and legal compliance:

- **Certifying to the EEOC the agency's full compliance with EEO laws, regulations and other guidance.**
- **Reporting annually to the EEOC on efforts and accomplishments and compliance with the agency's orders.**

The complete report is available at

<http://www.gao.gov/review/emir2005/emirmay2005.html>. ■

Retaliation

An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination.

The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding.

In addition to the protections against retaliation that are included in all of the laws enforced by Equal Employment Opportunity Commission, the Americans with Disabilities Act (ADA) also protects individuals from coercion, intimidation, threat, harassment, or interference in their exercise of their own rights or their encouragement of someone else's exercise of rights granted by the ADA.

Retaliation occurs when an employer takes an adverse action against a covered individual because he or she engaged in a protected activity.

An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding.

Examples of adverse actions include:

- **Employment actions such as termination, refusal to hire, and denial of promotion, or;**
- **other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.**

Source is the Equal Employment Opportunity Commission ■

Harassment in the Workplace

It is the policy of the VA that no employee will be subjected to harassment based on race, color, gender, religion, national origin, age, disability, or sexual orientation, and that no employee will be subjected to retaliation because he or she has brought forth such an allegation. Harassment that creates a hostile work environment is unwelcome conduct that is so severe or pervasive that it alters the employee's conditions of employment. It may take the form of verbal remarks, physical conduct, or displays of offensive material.

However, if the conduct is incited or welcomed, it is not harassment. Off-color or offensive jokes, even if made repeatedly, are not harassment if the employee bringing forth the allegation participates in the conduct. However, once an individual conveys that the conduct is not welcomed, or that the jokes are no longer considered "jokes", any conduct of the same nature that occurs thereafter may be considered harassment. In addition, the complainant need not be the subject of the harassment, but if the harassment creates a hostile environment, the individual may bring a claim.

Participation in the conduct does not always mean the conduct was welcomed. There may be a legitimate fear, particularly in quid pro quo sexual harassment cases (see below). The employee may believe that unless he or she acquiesces to the demand(s), termination will occur or other employment benefits will be withheld.

Allegations of harassment must be dealt with promptly and effectively. An immediate inquiry should be undertaken. Appropriate disciplinary action against any employee who engages in harassing conduct must also be taken. Such allegations should also be given the highest degree of confidentiality possible. Furthermore, employees interviewed, including the alleged victim, should be assured that they will not be subject to retaliation for their participation in any investigation.

The "VA Handbook - Prevention of Harassment" presents additional information on dealing with harassment in the workplace. It is available online at <http://www.va.gov/orm/Publications.htm>. ■

SELECTED EEOC DECISIONS

The following are excerpts of cases decided by the Equal Employment Opportunity Commission (EEOC) involving the Department of Veterans Affairs. Managers may find this information helpful in addressing workplace issues covered by Title VII, which prohibits employment discrimination based on race, color, religion, sex, or national origin; and the Rehabilitation Act of 1973, which prohibits employment discrimination against people with disabilities in the federal sector.

Compensatory Damages

Harassment Results in \$200,000.00 Award of Non- Pecuniary Compensatory Damages. Following a hearing, the agency adopted an EEOC Administrative Judge (AJ) finding of discrimination on the bases of religion (Jewish), race (Caucasian) and reprisal. Complainant, a Clinical Pharmacist, had been removed from her specialty clinic and isolated from doctors and co- workers who did not want to associate with her due to negative comments made by her supervisors. Complainant was treated like a pariah and felt isolated, humiliated, and depressed due to the loss of professional relationships and career opportunities. Complainant experienced an increase in frequency and duration of her migraine headaches, which her physician attributed to work-related stress. The Commission noted that there was no evidence that complainant's migraines would have worsened absent the discrimination. In addition, complainant was diagnosed with intestinal distress consistent with Irritable Bowel Syndrome (IBS). She also suffered an irritational fibroma, which had to be surgically removed, and which had been caused by complainant's biting her cheek due to stress. Complainant's symptoms persisted for five years. In addition to medical evidence, complainant submitted statements from co-workers describing the effects of the discrimination. There was no evidence that any outside factors contributed to complainant's distress. *Glockner v. Department of Veterans Affairs*, EEOC Appeal No. 07A30105 (September 23, 2004).

Grievances

Union's Right to File Grievance Does Not Extinguish Employee's Right. The Commission found that the underlying EEO complaint, regarding complainant's detail to another division, was not subject to dismissal on the grounds that complainant had filed a grievance. The union had filed a grievance, following complainant's reassignment, due to concerns that the action violated the collective bargaining agreement (CBA). The grievance was presented by the union based on its concerns related to the treatment of all employees. EEOC noted that an agency cannot deny a complainant the right to file an EEO complaint because the union has exercised its right to

file its own grievance pursuant to the terms of the CBA. There was no evidence that complainant was involved in the filing of the grievance. Therefore, he did not elect to pursue his claim in that forum. *Battu v. Department of Veterans Affairs*, EEOC Appeal No. 01A44033 (September 28, 2004).

Settlement Agreements


Oral Agreement Entered Into and Transcribed at Hearing Valid. The parties entered into a settlement agreement during a hearing before an AJ. Two days later, the agency drafted a written agreement, which complainant refused to sign due to a provision concerning the withdrawal of a pending action under the Federal Tort Claims Act. The Commission found that the parties had entered into a valid settlement agreement, the terms of which were set forth in the hearing transcript, and that the agency's subsequent draft was not executed and had no legal force or effect in the case. Further, the agreement set forth in the transcript referred only to complainant's EEO complaints and claims and did not obligate her to withdraw other claims outside the purview of the EEO process. *Clark v. Department of Veterans Affairs*, EEOC Appeal No. 01A44177 (November 10, 2004).

Source is "The DIGEST of Equal Employment Opportunity Law," Volume XVI, No. 1, Winter Quarter 2005. ■



We Would Like to Hear From You

Your suggestions or comments concerning topics covered in this newsletter or topics you would like to see covered, can be sent to Terry Washington, ORM External Affairs, by e-mail at terry.washington@va.gov or you can call (202) 501-2827.



Discrimination Complaint Processing Update is a quarterly publication of the Office of Resolution Management. Contact Terry Washington, External Affairs Program, by e-mail or by calling (202) 501-2800 concerning the contents of this newsletter. Additional information on ORM services and programs is available at <http://www.va.gov/orm>.